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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SCOTTISH RITE CATHEDRAL
ASSOCIATION OF LOS ANGELES,

Plaintiff and Respondent,

v.

MORRIS N. SHAOULIAN, as Trustee, etc.,

Defendant and Appellant.

B202709

(Los Angeles County
Super. Ct. No. BC371220)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gregory W. Alarcon, Judge. Affirmed.

Law Offices of George Baltaxe and George Baltaxe for Defendant and Appellant.

Law Offices of Larry Fabrizi, Larry Fabrizi and Christine Chung for Plaintiff and Respondent.

INTRODUCTION

This is an unlawful detainer action. The trial court granted the landlord's motion for summary judgment and entered a judgment in favor of the landlord. The tenant appeals. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Lease and Sublease*

On January 10, 2002, plaintiff and respondent Scottish Rite Cathedral Association of Los Angeles (plaintiff) entered into a lease, as landlord, with defendant and appellant Morris N. Shaoulion, as Trustee of the Morris A. Shaoulion Trust (defendant), as tenant, for real property located on Wilshire Boulevard in Los Angeles (Premises or Property). On that same day, defendant subleased the Property to Los Angeles Scottish Rite Center LLC (LLC).

Both the lease and the sublease, which were identical in most material respects, had a term from January 10, 2002 to January 31, 2036. The rent for the entire term for both the tenant and subtenant was \$1. Under the lease and sublease, plaintiff and the Los Angeles Lodge of Perfection of the Ancient and Accepted Scottish Rite of Freemasonry (Lodge) reserved the right to use certain portions of the Property.

Both the lease and sublease also contained the following provisions:

“5. USE OF PREMISES. Tenant shall not use the Premises for any purpose other than a use permitted under the zoning on the Premises from time to time ('Permitted Use'). . . .

“6. COMPLIANCE WITH LAWS. Tenant shall at its sole cost and expense comply with all laws, public and private land use restrictions . . . to the extent the foregoing apply to use of the Premises.

“14 EVENTS OF DEFAULT. The occurrence of any of the following shall constitute an 'Event of Default': [¶] (a) Tenant's failure to . . . (ii) comply with Articles 5 or 6, if any such failure continues for three days after written notice thereof; provided, if such noncompliance cannot be reasonably be cured within such three day period, Tenant

shall not be in default under this Article 14(a) if Tenant commences the cure within such period and diligently prosecutes the same to completion.”

2. *LLC and its Use of the Property*

LLC was formed on the same day the Lease and Sublease were signed. Defendant owned an 85% interest in LLC; the remaining 15% was owned by Lodge. Defendant, Melville H. Nahin and R. Stephen Doan were the managers of LLC. Mr. Nahin and Mr. Doan, who are not parties to this action, also served as officers of plaintiff and Lodge.

Defendant was president of LLC, while Mr. Nahin and Mr. Doan were the the secretary and chief financial officer, respectively. As president, defendant had a right to manage the day to day operations of LLC, subject to the control of the managers. Plaintiff had a right under the LLC operating agreement to appoint two of the three managers of LLC.

LLC rented the Property to third parties for special events. In 2004, LLC’s use of the Property came under scrutiny by the City of Los Angeles (City) following neighborhood complaints. Los Angeles Department of Building and Safety (LADBS) issued orders to comply advising defendant and LLC that they were violating various provisions of the Los Angeles Municipal Code and the conditional use permit for the Property. In October 2005, City revoked the Property’s certificate of occupancy.

3. *Plaintiff and LLC Pursue Litigation Challenging City’s Restrictions on the Property’s Use and Revocation of the Property’s Certificate of Occupancy*

In July 2005, LLC and plaintiff jointly retained attorney Roger Diamond to commence a lawsuit challenging City’s conditions on the use of the Property. In October 2005, LLC and plaintiff retained Mr. Diamond to commence a second action against City, this time challenging City’s revocation of the Property’s certificate of occupancy. These two actions were consolidated and shall be referred to herein as the “Scottish Rite Action.”

The Scottish Rite Action ultimately proved unsuccessful. In September 2006, the superior court denied LLC's and plaintiff's two petitions for administrative writ of mandate, and Division 7 of this Court affirmed that ruling on October 3, 2007. (*Scottish Rite Cathedral Assn. of Los Angeles v. City of Los Angeles* (2007) 156 Cal.App.4th 108, 114 (*Scottish Rite*).)

4. *The Criminal Complaint*

After City revoked the Property's certificate of occupancy, LLC continued to rent the Property to third parties for various events, including religious services, musical concerts and shows, and other entertainment events. On October 26, 2006, the People of the State of California filed a misdemeanor complaint in Los Angeles County Superior Court, Case No. 6HY04350 (Criminal Action) against plaintiff, LLC, defendant and Mr. Doan (criminal defendants). The complaint set forth 84 counts of state and local law violations based on alleged conduct which occurred at the Property from October 26, 2005 to October 1, 2006.

Criminal defendants were charged with contempt of court (Pen. Code, § 166(a)(4)) and with violation of various provisions of the Los Angeles Municipal Code, including sections 12.26, subdivision (E) [occupying or using a building without a certificate of occupancy], 12.27.1, subdivision (C)(4) [failure to comply with conditional use permit], and 91.103.3 [failure to comply with LADBS orders to comply]. All four criminal defendants pled not guilty to the charges. A trial on the misdemeanor complaint was scheduled to commence on September 10, 2007. Attorney Diamond represented defendant and LLC in the Criminal Action.

5. *The Orders to Comply*

In February 2006, defendant and plaintiff retained David C. Carlat, a land-use consultant, to assist them in the process of applying for a new certificate of occupancy for the Property. Mr. Carlat's efforts apparently proved unsuccessful.

On January 31, 2007, while the Criminal Action and appeal in the Scottish Rite Action were pending, LADBS issued two orders to comply (Orders to Comply), one to defendant and the other to LLC. The Orders to Comply cited defendant and LLC for

violations of Los Angeles Municipal Code provisions relating to use or occupancy of the Property without a certificate of occupancy. The Orders to Comply also stated: “The parking lot and parking structure is being used as a ‘staging area’ for a film production company, including the storage of vehicles, trailers and catering truck (with canopy).” The Orders to Comply ordered defendant and LLC to “[d]iscontinue the unapproved occupancy or use of the premises” and to “[o]btain the required Certificate of Occupancy.”

Mr. Carlat continued to assist plaintiff and defendant “with their efforts to cure all of the alleged violations contained in the . . . Orders to Comply[.]” These efforts included consulting with various City officials to learn exactly what was necessary to “satisfy their complaints.”

6. *The Three-Day Notice*

On May 1, 2007, while the Criminal Action and appeal in the Scottish Rite Action were pending, plaintiff served defendant and LLC with a three-day notice to quit or cure (Notice). The Notice stated that defendant and LLC had breached Articles 5 and 6 of the lease and sublease, respectively, as a result of the violations listed in the Orders to Comply and the complaint in the Criminal Action. Said breaches, the Notice stated, were events of default under Article 14(a) of the lease and Article 14(a) of the sublease, if not cured within three days.

7. *Procedural History of This Case*

On May 16, 2007, plaintiff commenced this unlawful detainer action against defendant and LLC, seeking possession of the Property. On August 24, 2007, plaintiff filed a motion for summary judgment. The court granted the motion on September 7, 2007, and entered judgment in plaintiff’s favor and against defendant and LLC on September 26, 2007. Defendant filed a timely notice of appeal. LLC is not a party in this appeal.

CONTENTIONS

Defendant contends that when he was served with the Notice, he was attempting to cure his breach of Articles 5 and 6 of the lease and, under Article 14(a), he was entitled to

continue his efforts without being required to vacate the Property. Defendant further contends that there was a triable issue of material fact with respect to his waiver and estoppel defenses and, accordingly, plaintiff's motion for summary judgment should have been denied.

DISCUSSION

1. Standard of Review

An order granting summary judgment is reviewed de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 (*Aguilar*).) A plaintiff moving for summary judgment bears the burden of showing that there is no triable issue of material fact with respect to plaintiff's cause(s) of action and that he or she is entitled to judgment as a matter of law. (*Id.* at p. 850; Code Civ. Proc., § 437c, subd. (c).)

2. Defendant Did Not Commence a Cure of the Default Within Three Days

LLC occupied and used the Property in violation of City ordinances and zoning decisions. (Los Angeles Mun. Code, §§ 12.26, 12.27.1, 91.103.1; *Scottish Rite, supra*, 156 Cal.App.4th at pp. 112-114.) LLC continued such unlawful use and occupancy of the Property despite numerous LADBS orders to cease such conduct and a criminal complaint filed by City. This conduct constituted a breach of Articles 5 and 6 of the sublease. Likewise, under the lease, defendant remained fully liable to perform lease obligations even though the Property was subleased to LLC. (Lease, Art. 9(e).) Thus, LLC's unlawful use and occupancy of the Property resulted in defendant's breach of Articles 5 and 6 of the lease.

Defendant admits in his answer to plaintiff's complaint that he and LLC "failed to comply with the requirements of the [Notice]" within three days of receiving the Notice. This failure was an event of default under Article 14(a) of the sublease and Article 14(a) of the lease.¹

Article 14(a) of both the lease and sublease provides: "*if . . . noncompliance [with Articles 5 or 6] cannot reasonably be cured within [three days after written notice*

¹ An event of default under the sublease is also in and of itself an event of default under the lease. (Lease, Art. 14(e).)

thereof], Tenant shall not be in default under this Article 14(a) if Tenant commences the cure within such period and diligently prosecutes the same to completion.” (Italics added.) Defendant argues that LLC’s and his noncompliance with Articles 5 and 6 could not be reasonably cured within three days of receiving the Notice. He further argues that he and LLC commenced a cure within the three-day period because (1) the Scottish Rite Action was pending; and (2) Mr. Carlat was allegedly working to satisfy City’s “complaints.” We disagree.

LLC could have reasonably cured its and defendant’s noncompliance with Articles 5 and 6 of the sublease and lease, respectively, within three days of receiving the Notice by ceasing its use and occupancy of the Property. But LLC chose not to do so. Instead, it continued its unlawful use and occupancy of the Property while pursuing its unsuccessful efforts in and out of court to obtain a revised conditional use permit and a new certificate of occupancy.

Under defendant’s view, LLC could have continued to unlawfully use and occupy the Premises without fear of eviction so long as it (1) maintained a civil action challenging the City’s land use decisions or (2) retained a land use specialist to lobby City officials to change their position. Plaintiff, defendant contends, was powerless to evict LLC and defendant even though plaintiff faced criminal prosecution as a result of LLC’s unlawful conduct. Defendant, however, has cited no authority to support his position, and we have found none.

3. *Defendant Did Not Raise a Triable Issue of Material Fact With Respect to Its Estoppel Defense*

Plaintiff met its burden of showing that it was entitled to summary judgment with respect to its prima facie unlawful detainer cause of action. The burden thus shifted to defendant to set forth specific facts showing that a triable issue of material fact existed as to that cause of action or a defense thereof. (Code Civ. Proc., § 437c, subd. (p)(1); *Aguilar, supra*, 25 Cal.4th at p. 849.) Defendant failed to meet its burden with respect to its estoppel defense.

“A party asserting the defense of estoppel must establish the following elements: (1) the party estopped must know the facts; (2) the party estopped must engage in conduct intended to be acted upon by the party asserting estoppel; (3) the party asserting estoppel must be ignorant of the true state of facts; and (4) injury must result from reliance on the other’s conduct.” (*Wells Fargo Bank v. Bank of America* (1995) 32 Cal.App.4th 424, 437-438.) Defendant claims that plaintiff was estopped from evicting defendant because plaintiff joined LLC in pursuing the Scottish Rite Action and “mutually defend[ed]” the Criminal Action. Defendant, however, presented no evidence that he detrimentally relied on plaintiff’s conduct. Accordingly, defendant’s estoppel defense did not preclude granting summary judgment to plaintiff.

Defendant’s reliance on *Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526 is misplaced. There, subtenants breached a sublease by failing to prohibit third parties from camping on the premises. The landlord knew about the breach, but did nothing about it for an extended period of time. The landlord also approved of subtenants’s construction of permanent improvements on the property and permitted subtenants to engage in other expenditures. (*Id.* at pp. 531-532.) Here, by contrast, no admissible evidence of similar detrimental reliance by defendant was presented by defendant in opposition to plaintiff’s motion for summary judgment.

4. *Defendant Did Not Raise Its Waiver Defense Below*

Defendant argues that plaintiff waived its right to claim forfeiture of the lease based on its conduct, namely pursuing the Scottish Rite Action and jointly defending against the Criminal Action. This waiver defense, however, was not raised in opposition to plaintiff’s motion for summary judgment.² “New theories of defense, just like new theories of liability, may not be asserted for the first time on appeal.” (*Bardis v. Oates* (2004) 119 Cal.App.4th 1, 13-14, fn. 6.)

² Contrary to defendant’s contention, the defense was not “somewhat inartfully” raised. Indeed, defendant stated in his opposition that “ ‘waiver’ and ‘estoppel’ are two distinct doctrines that rest upon different legal principles,” then went on to argue plaintiff was barred by estoppel without making any such argument regarding waiver.

DISPOSITION

Judgment in favor of plaintiff and against defendant is affirmed. Plaintiff is awarded its costs on appeal.

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KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.